SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1966.

No. 959

EMILIO ALBERGO,

Petitioner,

v.

READING COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

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OCTOBER TERM, 1966.

No.

EMILIO ALBERGO,

Petitioner,

v.

READING COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The Petitioner, Emilio Albergo, was at all times pertinent to this petition an individual employed by Respondent, Reading Company, a railroad corporation duly incorporated under the laws of the Commonwealth of Pennsylvania. Petitioner respectfully prays that this Honorable Court grant a writ of certiorari to the United States Court of Appeals for the Third Circuit to review a judgment of that Court entered August 19, 1966, in which a petition for rehearing was denied October 13, 1966.

OPINIONS BELOW.

The opinion and order of the Court of Appeals dated August 19, 1966, is set forth in an appendix to this petition together with the order denying petition for rehearing. The opinion has not yet been published.

JURISDICTION.

(a) The judgment of the Court of Appeals for the Third Circuit, reversing the judgment in favor of this Petitioner which had been entered in the United States District Court for the Eastern District of Pennsylvania was entered on August 19, 1966, Judge Freedman dissenting.

(b) Pursuant to its rules, the Court of Appeals for the Third Circuit entered an order August 26, 1966, extending to September 15, 1966, the time within which a petition for rehearing might be filed. Petition for rehearing was filed September 15, 1966, and denied October 13, 1966.

(c) Jurisdiction to consider this petition is conferred upon this Court by 28 U. S. C. A. 1254(1), the petition being timely filed under the provision of 28 U. S. C. A. 2101(c).

QUESTIONS PRESENTED.

1. Has not an F. E. L. A. employee been deprived of his Constitutional right to a jury trial by a Court of Appeals entering Judgment N. O. V. where the evidence, and the law as mandated by this Court and Courts of Appeals other than the Third Circuit, clearly support with reason a jury finding of employer negligence?

2. Does not a railroad employer have a non-delegable duty to provide a reasonably safe place to work and does not this duty include a non-delegable and absolute duty to inspect railroad cars, their cargo and all appliances used to secure such cargo, whether originating on a foreign railroad or not?

3. Coupled with an eighteen-year history of metal bands breaking, is not the breaking of a metal band used to secure large pipes carried as cargo above the sides of a gondola car sufficient evidence to support, with reason, a finding by a jury that the band was either defective, improperly secured, inadequate for its purpose or that the cargo was improperly stored and thereby imposed on the carrier the obligation to inspect or require consignor or itself to adopt safer shipping techniques?

4. Is not the Court of Appeals required to apply the doctrine of res ipsa loquitur where injury resulted from the breaking of a two-inch metal band used to secure cargo carried above the sides of a gondola car where the gondola car, the cargo and band are in the exclusive control of Respondent and the accident would not have occurred in the ordinary course of things without Respondent's want of due care?

STATEMENT OF THE CASE.

The subject matter of this petition relates to an accident which Petitioner suffered while in the course of his employment by Respondent railroad on July 15, 1958. Suit was filed under the Federal Employers Liability Act, 45 U. S. C. A. § 51 et seq. and the Safety Appliance Act, 45 U. S. C. A. § 1-23, but withdrawn as to the latter at trial.

A general verdict of $23,100 was found by a jury after a full and adequate charge by the trial court. Judgment was entered on the verdict by the United States District Court for the Eastern District of Pennsylvania. Respondent's Motions for New Trial and Judgment N. O. V. for the accident of July 15, 1958, were denied by the trial court.

At the time of the accident of July 15, 1958, Petitioner was engaged in the performance of his duties as a conductor for Respondent in its Erie Avenue Freight yards at Philadelphia, Pennsylvania. Petitioner had been instructed to couple an engine to a draft of about fifteen gondola cars loaded with large pipes. These pipes were approximately eighteen to twenty-four inches in diameter and were piled four or five feet above the sides of the cars.

The two-inch metal bands were secured to each side of the gondola car and strung over the pipes in such a way as to hold the pipes in place. While engaged in moving the draft, Petitioner was standing next to the lead gondola car, when one of the metal bands snapped and struck him whip-like fashion in the testicles.

Metal bands of the same type and used for the same purpose had snapped on numerous prior occasions going back, according to one witness, eighteen years before the accident. In spite of being immediately notified of the accident, and the identity of the offending car and band, Respondent offered no evidence concerning the cause of the band breaking.

Notwithstanding the jury verdict and the mandates of this Court to the contrary, the Court of Appeals in a divided opinion concluded as a matter of law that Respondent was not negligent for the accident of July 15, 1958, and deprived Petitioner of his verdict. In so doing, the majority bottomed its decision in the observation that "[t]here was absolutely no evidence in the instant case as to what caused the band to break" (Opinion p. 4a). And further, "[i]ndeed, *it was not even shown that the railroad had anything to do with the loading of the cars.* This would not relieve the defendant of liability *if it* was guilty of some negligent conduct which contributed to the occurrence in question, but there was no evidence from which it could have been inferred that it was" (Opinion p. 4a, emphasis added). This conclusion is manifestly in error. Not only does this language eliminate the doctrine of res ipsa loquitur but it also totally ignores opinions of this Court that the employer can be liable for an unsafe condition created prior to its receipt of the car.

Dissenting from this view, Judge Freedman quite properly observed "[t]hat existence of a number of broken bands over a period of time was enough to permit the jury to conclude that defendant should either have required shippers to use stronger bands or should have inspected the bands which were used."

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

A. The Court of Appeals Has Usurped the Jury Function and Denied to Petitioner His Right to a Jury Trial.

The clear and simple function of an appellate court in F. E. L. A. cases has been repeatedly defined by this Court as "limited to the single inquiry whether with reason the conclusion may be drawn that negligence of the employer played any part at all in the injury or death." *Rogers v. Missouri Pacific Railroad Company,* 352 U. S. 500, 507, 77 S. Ct. 443, 449, 1 L. Ed. 2d 493 (1957).

While *Rogers, supra,* was concerned primarily with causation it clearly applied also to the issue of employer negligence. "The Congress when adopting the law was particularly concerned that the issues whether there was *employer fault* and whether that fault played any part in the injury or death of the employee should be decided by the jury whenever fair-minded men could reach these conclusions on the evidence." (Emphasis ours.) *Rogers v. Missouri Pacific Railroad Co., supra.*

In spite of the clarity with which the doctrine has been proclaimed, this Court has all too frequently been called upon to reverse appellate courts either unwilling or unable to apply it, as in *Dennis v. Denver Rio Grande Western R. Co.,* 375 U. S. 208, 84 S. Ct. 291, 292, 11 L. Ed. 2d 256 (1963) where an appellate court deprived an F. E. L. A. employee of his verdict. A workman improperly dressed for the job was required to work in temperatures between 10 degrees and minus 5 degrees fahrenheit and suffered frostbite during the discharge of his duties. This Court promptly corrected the error observing that, ". . . these facts, if believed, establish negligence by respondent railroad, since they show that the foreman, who had control over the petitioner's activities while on this job, did not take all necessary and reasonable precautions to prevent injury to peti-

tioner when put on notice of his condition." Also significant is *Gallick v. Baltimore and Ohio Railroad Co.*, 372 U. S. 108, 83 S. Ct. 659, 9 L. Ed. 618 (1963), in which this Court reversed a Judgment N. O. V. and held that where an infectious insect bite occurred near a contaminated pool of water in the area where plaintiff was required to work, a jury was entitled to conclude that the insect was drawn to the area or made infectious by the fetid water and that permitting the dangerous condition to exist was negligence.

Again, as in *Gallick* and *Dennis, supra,* the instant case presents a clear and compelling factual issue for the jury. It is uncontradicted that the two-inch metal band broke. It was in use to secure heavy cargo stacked four or five feet above the sides of a gondola car. The evidence was clear that similar bands had broken on prior occasions. In addition, all the instruments of causation, the band, cargo and gondola car, were in the exclusive control of Respondent.

Paradoxically, the Court of Appeals was itself able to infer from the evidence four likely causes of the band breaking,[1] but denied to Petitioner the benefit of any of these. Moreover, the majority persists not only in their demand that Petitioner prove the exact cause of the mishap, but concludes that there is no employer negligence unless Petitioner further shows that Respondent ". . . was guilty of some conduct which contributed to the occurrence in question, . . ." (Opinion p. 4a).

This is precisely the same error made by the same Court of Appeals in *Shenker v. Baltimore & Ohio R. Co.*, 303 F. 2d 596 (3rd Cir. 1962), reversed and remanded 374 U. S. 1, 83 S. Ct. 1667, 10 L. Ed. 709 (1963). There, as here, the Third Circuit failed to recognize and impose on an F. E. L. A. employer the non-delegable and absolute duty to inspect a baggage car, simply because it was not owned or controlled by the defendant railroad. If, as in *Shenker,*

1. ". . . For example, there was no showing that the band was defective, or inadequate, that it was improperly attached, or that the manner in which the pipes were secured was in any way related to the breaking of the band. . . ." (Opinion p. 4a).

supra, an employer is required to inspect a car of another railroad over which it has no control and if its failure to do so can be said with reason to support a jury verdict of employer negligence, how much more certain is the reasonable conclusion of the jury in the instant case where Respondent not only had exclusive possession of the offending parts, but had knowledge of the fact that bands had broken many times previously.

This jury had little difficulty concluding from the evidence and, with reason, either that the band was unsafe for the use to which it was put *or* that it was rusted *or* otherwise defective, *or* that it was improperly attached to the car *or* that the pipes were piled too high to be safely held in place by the band. Additionally, regardless of the actual physical cause of the break, a finding from the evidence that the break was due in part to a failure of Respondent to inspect the cargo or failure to require consignors to use stronger or different bands is compelling and reasonable. This is precisely Judge Freedman's dissent.

Ignoring for a moment the evidence of prior breaking of bands and Respondent's knowledge thereof and assuming that Petitioner did no more by way of producing evidence than the Court below opines he did, the decision still deprives him of the rule of res ipsa loquitur, to which he was entitled under the undisputed facts. This record comports in all respects to the reasoning of this Court in applying the doctrine in F. E. L. A. cases.[2]

B. The Decision Below Ignores the Duty of F. E. L. A. Employers to Inspect Cars and Attachments and Provide a Safe Place to Work.

For seven decades this Court has imposed on railroad employers a duty not only to inspect their own cars but cars of others in their possession.

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2. See 35 A. L. R. 2d 475 Annotations of 43 F. E. L. A. cases applying res ipsa loquitur.

"We are of opinion that sound reason and public policy concur in sustaining the principle that a railroad company is under a legal duty not to expose its employees to dangers arising from such defects in foreign cars as may be discovered by reasonable inspection before such cars are admitted to its trains." *Baltimore and Potomac R. Co. v. Mackey,* 157 U. S. 72, 91, 15 S. Ct. 491, 39 L. Ed. 624 (1894).

In *Texas & Pacific Ry. Co. v. Archibald,* 170 U. S. 665, 671, 18 S. Ct. 777, 42 L. Ed. 1188, this Court further observed that ". . . it is a duty of the employer to furnish appliances free from defects discoverable by the exercise of ordinary care and that the employee has a right to rely on this duty being performed." See also *Bailey v. Central Vermont Ry. Co.,* 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444 (1943) and *Sano v. Pa. R. R. Co.,* 282 F. 2d 935 (3rd Cir. 1960).

Moreover, the duty of an F. E. L. A. employer to inspect tracks over which it moves its trains implies constructive notice of any unsafe condition even though the employer does not own or control the tracks in question. *Harris v. Pennsylvania R. Co.,* 361 U. S. 15, 80 S. Ct. 22, 4 L. Ed. 2d 1 (1959). This principle has long been understood and applied by Courts of Appeal. In *Denver Rio Grande Western R. Co. v. Conley,* 293 F. 2d 612 (10th Cir. 1961) an F. E. L. A. employee, while a passenger on a switch engine, was injured because of a defective track on premises not under the employer's control; *Chicago Great Western R. Co. v. Casura,* 234 F. 2d 441 (8th Cir. 1956), imposed liability for failure of the railroad to inspect a defective gate on the private property of a consignee; and *Payne v. Baltimore and Ohio Railroad Co.,* 309 F. 2d 546 (6th Cir. 1962), involved a car derailed by ashes negligently allowed by a consignee to accumulate on its spur track. Recovery was sustained in part because the jury was justified in finding ". . . liability by virtue of defendants

independent negligence in sending the boxcar on a track having a dangerous condition present *which could have been foreseen* . . . "[3] (Emphasis ours.)

Strikingly in *Payne, supra,* there was no evidence that the accumulation of ashes had developed on prior occasions—in fact the evidence did indicate that this particular condition did not develop on the consignee's property until several hours before the accident. Whether the condition was reasonably foreseeable was a jury issue. How much more compelling the instant case where there was evidence of respondent's knowledge of the danger preceding the accident by eighteen years and no evidence of the employer's efforts, if any, to protect Petitioner from the known hazard.

Has an F. E. L. A. employer discharged its duty to provide a safe place to work when the premises alone are safe, without regard to dangers or defects existing in cars, equipment, or acts of co-employees? This Court has frequently and emphatically answered that question in the negative. In *Harrison v. Missouri Pacific R. Co.,* 372 U. S. 248, 83 S. Ct. 690, 9 L. Ed. 2d 711 (1963). The Court reversed the Illinois Appellate Court, 35 Ill. App. 2d 66, N. E. 2d 737, which had set aside a jury verdict for an employee injured by the intentional tort of a co-worker. Knowledge by defendant of the danger was for the jury, since there was evidence to support this conclusion. Whether ". . . the foreseeable danger was from intentional or criminal misconduct is irrelevant; respondent nonetheless has a duty to make reasonable provision against it." Unreasonable exposure to weather was the basis for recovery in *Dennis v. Denver Rio Grande Western R. Co., supra,* and *Braswell v. New York, Chicago and St. Louis R. Co.,* 377 U. S. 405, 84 S. Ct. 1628 L. Ed. 2d (1964) reinstated a

3. See also *Kooker v. Pittsburgh & Lake Erie R. R. Co.,* 258 F. 2d 876 (6th Cir. 1958) where an employee was injured while descending an icy path on a neighboring premises in his efforts to reach the place where he was assigned to work.

verdict based on employer negligence in assigning the plaintiff to work he was physically unable to do.

Unchallenged and unchanged is the reasoning of *Dudley v. Scandrett,* 115 F. 2d 728 (9th Cir. 1940). A baggageman was lacerated by a sharp edge on a smokejack being shipped as cargo. The injury occurred as the employee reached for other cargo behind the smokejack. The employer's negligence was in failing to demand of the consignor that the parcel be wrapped in a way that would pad and cover the knife-like edge of the shipment and render it reasonably safe for handling. When considering the hazards created by the metal strap in the instant case and the fact that the hazard was well known for many years, it was manifest that the employer was negligent in failing to demand of consignors a safer method of securing the cargo or in applying less strain on the bands by carrying less cargo in each car. Notwithstanding their knowledge of prior incidents, not only was there no evidence of any effort to demand safety of the consignor; but there was no evidence that the car, the cargo or the metal bands were at any time inspected by the railroad.

Of paramount interest on the issue of Respondent's duty is *Shenker v. Baltimore & Ohio R. Co., supra.* Plaintiff, a baggageman from B & O, was required to load baggage at a P. & L. E. station. He was away from B & O premises and working on a P. & L. E. train when he was injured because of a defective door. In reversing the Third Circuit and reinstating a jury verdict, this Court concluded:

> ". . . We hold that the B & O had a duty to inspect P. & L. E. cars before permitting its employees to work with them . . ." 374 U. S. 8, 83 S. Ct. 1672.

And further:

> ". . . Nor is it an answer to claim that the B & O lacked control or supervision over the P. & L. E. car.

> Such arguments have never supported an exception to the employer's duty to provide a safe place to work, ..." 374 U. S. 10, 83 S. Ct. 1673.

Is it to be argued in this case, as a matter of law, that an inspection of the car or cargo would not have disclosed the hazardous condition? To do so is to say that the railroad, by refusing to discharge its duty to inspect, is able to escape liability simply by not knowing the exact cause of the accident, notwithstanding that the band did break and that the railroad knew of prior incidents of bands breaking. Clearly, the questions of whether an inspection or whether safer methods of shipping would have eliminated the defect were properly for the jury.

C. The Court of Appeals Has Denied Petitioner the Fair Inferences From Facts in Evidence.

Pursuant to the mandates of *Rogers v. Missouri Pacific Railroad*, 352 U. S. 500, 507, 77 S. Ct. 443, 449, 1 L. Ed. 2d 493 (1957), the simple issue in considering inferences of the evidence is whether they support ". . . with reason, the conclusion . . . that negligence of the employer played any part at all in the injury or death". Thus, in *Basham v. Pennsylvania R. Co.*, 372 U. S. 699, 701, 83 S. Ct. 965, 10 L. Ed. 2d 80 (1963) where a car repairman, while on a hoist type platform, was injured by its sudden shifting movement, he was required to show only that the platform moved, *not what caused it to move.* On the reasoning of the present case, the Court below would no doubt have required Mr. Basham to prove not only the cause of the platform moving but that whatever the cause it was due to the railroad's negligence. This is virtually the same error which required certiorari to the New York Court of Appeals in *Basham, supra.*

In demanding of petitioner that he prove the cause of the band snapping or breaking, the decision below is manifestly contrary to every dictate of this Court. In

Harris v. Pennsylvania R. Co., 361 U. S. 15, 80 S. Ct. 22, 4 L. Ed. 2d 1 (1959), an employee of the Pennsylvania Railroad slipped on a crosstie while at work on Nickel Plate Railroad property. From the sole evidence of grease on his shoe after the fall, a jury found that there must have been grease on the crosstie which caused plaintiff's injury, notwithstanding there was no direct evidence of grease on the crosstie, who put it there or whether the Pennsylvania Railroad could have discovered it by inspection. Further, even though the accident occurred on Nickel Plate Railroad property, it was still the duty of the employer railroad to see that the crosstie was safe for its employee's use. In the present case this jury had no need to infer the immediate cause of the injury, such as grease on the crosstie, or prior knowledge of a dangerous condition, by the railroad. That the band broke and struck petitioner and that this had happened on previous occasions, were matters of direct evidence. Is it less reasonable for a jury to find employer negligence as a cause in the instant case than where there is grease on a partially concealed crosstie on a foreign railroad, no evidence of how long it was there, who put it there or whether it could have been observed by inspection? The inferences from which the jury found its verdict in *Harris v. Pennsylvania R. Co., supra,* are immensely broader than the present case and yet were ignored by the Court of Appeals.

Patently contrary to the court below is *Conner v. Butler,* 361 U. S. 29, 80 S. Ct. 21 (1959), 4 L. Ed. 2d 10 (1959), which involved an employee injured by a passenger car trapdoor which fell on him as he passed through it. Again, there was no direct evidence that the trapdoor was broken or otherwise defective, yet there was a jury question presented. *Conner* represented a situation where the jury was allowed to infer "defectiveness" and "knowledge" on the railroad's part without direct support in the evidence. In the instant case "defectiveness" was obvious—the band broke. Secondly, there was *direct* evidence of

bands breaking on prior occasions. It seems beyond argument that there was no justification in either fact or law for the Court of Appeals to take this employee's verdict from him.

Also, the decision below ignores *Davis v. Baltimore & Ohio R. Co.*, 379 U. S. 671, 85 S. Ct. 636, 13 L. Ed. 2d 594 (1965), where from the fact of plaintiff's fall in an elevator shaft and the presence of a fork lift truck near where he had been working, a jury concluded, with reason, that movement of the truck caused plaintiff's fall and that this movement was due to employer negligence.[4]

It is eminently clear that the simple and compelling explanations for the band breaking in the present case all reasonably involve defendant's negligence as a cause. Had respondent discharged its duty to inspect, it could have discovered a defective band or one that was twisted or improperly applied.

If, in fact, the pipes were stacked too high for the capacity of the band in question, this also would have been discovered by inspection. The railroad was on notice that these bands did break in the past and was under a duty to determine whether they were generally adequate for the purpose. Reasonable men could and did conclude that plaintiff's injury was caused, in whole or in part, by the failure of defendant to anticipate, inspect, and correct the defective condition.

D. The Court Below Has Denied Petitioner Application of the Res Ipsa Loquitur Doctrine.

The import of res ipsa loquitur is that where the circumstances surrounding the happening of an accident support its application, the burden of going forward with

4. See also: *Meeks v. Georgia Southern & Fla. Rwy. Co.*, 377 U. S. 405, 84 S. Ct. 1628, 12 L. Ed. 2d 495 (1964), where plaintiff may have been injured in alighting from a train or moving a derailer or chocking a car; and *Gallick v. Baltimore & Ohio R., supra,* where no one could identify the type or toxic nature of the contaminated bug.

evidence shifts to the defendant to explain the happening of the accident. At this point there is a jury issue, whether defendant decides to offer evidence or not. This doctrine has long been applied in F. E. L. A. cases. *Sweeney v. Erving,* 228 U. S. 233, 33 S. Ct. 416, 57 L. Ed. 815 (1913).

As defined by this Court in *San Juan Light & Transit Co. v. Requera,* 224 U. S. 89, 98, 32 S. Ct., 56 L. Ed. 680 (1912) the doctrine applies:

> "When a thing which causes injury without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if one having such control uses proper care, it affords reasonable evidence in the absence of an explanation that the injury arose from the defendant's want of care."[5]

The significance of the doctrine and its application to the present case is evident from *Johnson v. United States,* 333 U. S. 46, 68 S. Ct. 391, 92 L. Ed. 1143 (1948). The injured employee could testify only that a block being held above him by a co-worker fell and struck him on the head. There was no evidence concerning the cause of the block falling. In applying the res ipsa loquitur doctrine this Court noted:

> ". . . the falling of the block is alone sufficient basis for an inference that the man who held the block was negligent." 33 U. S. 48

and further:

> ". . . no act need be explicable only in terms of negligence in order for the rule of res ipsa loquitur to be invoked. The rule deals only with permissible inferences from unexplained events." 33 U. S. 49

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5. See also *Jesionowski v. Boston and Maine R. Co.,* 329 U. S. 452, 67 S. Ct. 401, 91 L. Ed. 416 (1947). An F. E. L. A. case.

Would there be a difference in applicable evidentiary rules if Petitioner had been struck by a pipe falling when the band broke? Indeed, there is no legal or logical difference in an employee being struck by a falling pipe, or falling block, or by snapping bands. All involve injury which in the ordinary course of things would not occur if the railroad, having control, had not been lacking in due care.

Also analogous on its facts but contrary in its result to the instant case is *O'Neill v. Baltimore and Ohio R. Co.*, 348 U. S. 956, 75 S. Ct. 447, 99 L. Ed. 747 (1955). Plaintiff's injury resulted from a bolt breaking. There was no direct evidence as to what caused the bolt to break. Notwithstanding defendant's evidence that the bolt was new and not manufactured by it, this Court held that the mere fact that it broke constituted a jury issue. Whether a bolt breaks or a band snaps, both afford reasonable evidence that the injury was caused by the employer's want of care, since neither would occur in the ordinary course of things without a lack of due care by the railroad.

Of the several probable causes of the band breaking, the jury could have found either, that it was inadequate or defective, or improperly attached or that the car was overloaded with pipe. All are clearly explainable, with reason, on the basis of defendant's negligence in failing to inspect the bands or in failing to use reasonable care in maintaining cars in its control reasonably safe for use.

Notwithstanding that the railroad had exclusive control of the car and its cargo and had immediate notice of the accident and the car involved, no evidence was offered to show that an inspection was made or the results thereof before or after the accident. In spite of this, the Court below has relieved the railroad of its burden by demanding of Petitioner that he show why the band snapped. The Court of Appeals stripped from Petitioner the benefits of res ipsa loquitur—then, on a reduced record, entered Judgment N. O. V.

CONCLUSION.

Certiorari should be granted to review this decision, which denies to Petitioner his fundamental right to a jury trial guaranteed by the Federal Employers' Liability Act and decisions of this Court.

The Appeals Court has deprived Petitioner of a jury verdict, which was clearly justified, with reason, on the fair inferences of the evidence, without being able to ascribe a single possible cause of the accident which does not involve employer negligence.

The decision ignores the Respondent's duty, as mandated by numerous decisions of this Court, to provide a reasonably safe place to work and the concomitant duty to inspect not only premises, but appliances, cars and their cargo.

Finally, Petitioner has been denied the fundamental application of the doctrine of res ipsa loquitur, notwithstanding that all explanations for the cause of the accident, as well as the cause itself, were within Respondent's exclusive knowledge and control and reasonably explainable on the basis of Respondent's negligence.

Certiorari is required not only in justice to Petitioner, but to clear the record of a decision which is certain to confound and confuse and which is fundamentally contrary to the numerous mandates of this Court.

It is respectfully submitted that the order of the Court of Appeals be reversed and the jury verdict reinstated.

Respectfully submitted,

JAMES E. BEASLEY,
Attorney for Petitioner.

APPENDIX.

A. Order of the District Court for the Eastern District of Pennsylvania.

AND Now, this 20th day of May, 1965, upon consideration of the transcript of testimony of the trial of the cause, the argument of counsel thereon and the briefs submitted, this Court being of the opinion that the record is sufficient to sustain the jury's finding in favor of the plaintiff and that the errors alleged do not justify the granting of a new trial, it is hereby ORDERED, ADJUDGED and DECREED that the defendant's motions for Judgment NOV and a New Trial be and the same are hereby DENIED.

By THE COURT:

J. M. DAVIS, *J.*

B. Court of Appeals Opinion.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15489

EMILIO ALBERGO

v.

READING COMPANY,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued February 3, 1966

Before STALEY, SMITH and FREEDMAN, *Circuit Judges.*

OPINION OF THE COURT

(Filed August 19, 1966)

By SMITH, *Circuit Judge.*

This appeal is from a judgment entered on a jury verdict in favor of the plaintiff in an action under the Federal Employers' Liability Act, 45 U. S. C. A. § 51.[1]

1. At the close of the plaintiff's evidence the defendant moved for a directed verdict in its favor; this was renewed at the close of all the evidence; and, following the adverse verdict, the defendant moved for judgment notwithstanding the verdict and, in the alternative, for a new trial. These motions were denied.

There are involved two independent claims which must be treated separately. The first is for an injury sustained in an accident which occurred on July 16, 1958; the second is for an injury sustained in an accident which occurred on November 17, 1961. The applicability of the Act is not disputed.

FIRST CLAIM

The plaintiff was employed by the defendant as a conductor and, at the time of the accident, was engaged with his crew in assemblying a draft of gondola cars which were to be moved from one siding to another. These cars were loaded with sections of pipe which were lashed together by steel bands two inches in width. As the coupling between the locomotive and the lead car was effected one of the bands snapped and struck the plaintiff, who was standing near the lead car.

The important question for decision is whether the evidence, viewed in the light most favorable to the plaintiff, was sufficient to warrant submission of the first claim to the jury. We recognize, as we must, that our "appraisal of the proofs . . . is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all" in the occurrence which resulted in the plaintiff's injury. *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 507 (1957).

The test of a jury case "is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury . . . for which damages are sought." *Rogers v. Missouri Pacific R. Co., supra,* at 507. The evidence may be minimal but it must be sufficient "to provide the jury with some rational basis for concluding that some negligence of the railroad" proximately contributed to the accident. *Dessi v. Pennsylvania Railroad Company,* 251 F. 2d 149, 150 (3rd Cir. 1958), cert. den. 356 U. S. 967; *Gill v. Pennsylvania*

R. Co., 201 F. 2d 718 (3rd Cir. 1953), cert. den. 346 U. S. 816. The issue of negligence may not be submitted to the jury solely on the basis of conjecture.

There was absolutely no evidence in the instant case as to what caused the band to break. For example, there was no showing that the band was defective or inadequate, that it was improperly attached, or that the manner in which the pipes were secured was in any way related to the breaking of the band. Indeed, it was not even shown that the railroad had anything to do with the loading of the cars. This would not relieve the defendant of liability if it was guilty of some negligent conduct which contributed to the occurrence in question, but there was no evidence from which it could have been inferred that it was.

Several of the plaintiff's fellow employees testified that prior to the accident they had seen bands dangling over the sides of the gondola cars but they were unable to say that these had broken. While one witness testified that in his eighteen years of experience with the railroad he had seen bands break at least twice, there was no evidence as to what caused these bands to break or the circumstances under which they broke. The testimony of the plaintiff's fellow employees thus lacked probative value.

The plaintiff's proofs established nothing more than that he was injured as a result of an accident. Plainly, this was not enough to justify the submission of his first claim to the jury.

Second Claim and General Verdict

The plaintiff suffered minor injuries on November 17, 1961, when he was struck by a defective end gate of a gondola car. There was ample evidence that the negligence of the defendant was the proximate cause of the accident, and this is not disputed. However, we have no way of knowing whether the jury's verdict was based solely on the second claim.

At the conclusion of the charge, and after the objections of counsel were considered, the court instructed the jury as follows:

> "Ladies and gentlemen of the jury, . . . I would point out to you that if you do bring in a verdict for the [plaintiff] it shall be in one lump sum covering all of the factors that I have given you in the matter of damages—a single lump sum. Is that clear?"

In compliance with this instruction the jury returned a general verdict in the amount of $23,100 without any specification as to whether its decision was based on the first or second claim, or both.

Since the evidence was insufficient to warrant submission of the first claim to the jury, the judgment of the court below would be sustainable only if the verdict rested solely on the second claim. The form of the verdict makes it impossible for us to determine whether it rested on the first claim, the second, or both. Where, as here, a general verdict may rest on either of two claims—one supported by the evidence and the other not—a judgment thereon must be reversed. *Fatovic v. Nederlandsch-Ameri-Daansche Stoomvaart,* 275 F. 2d 188, 190 (2nd Cir. 1960); *North American Graphite Corp. v. Allan,* 184 F. 2d 387, 389 (D. C. Cir. 1950); *Atlantic Coast Line R. Co. v. Tiller,* 142 F. 2d 718, 722 (4th Cir. 1944).

A new trial in this case would be unnecessary if the court below had employed either of the procedures authorized by Rule 49 of the Federal Rules of Civil Procedure, 28 U. S. C. A., which were designed to encourage and facilitate the use of a special verdict, or, in the alternative, the general verdict accompanied by answers to specific interrogatories.

The judgment of the court below will be reversed with directions (1) that a judgment in favor of the defendant be entered on the first claim; and (2) that a new trial be had on the second claim.

FREEDMAN, *Circuit Judge,* concurring in part and dissenting in part.

I believe that under the doctrine of *Rogers v. Missouri Pacific R. Co.,* 352 U. S. 500 (1957), there was enough evidence of negligence, however meager it may be, to require submission to the jury of the question of liability on the first claim. The existence of a number of broken bands over a period of time was enough to permit the jury to conclude that defendant should either have required shippers to use stronger bands or should have inspected the bands which were used.

I therefore dissent from the direction that judgment be entered for defendant on the first claim.

I would, however, reverse the judgment of the court below and grant a new trial on the first claim because the trial judge unduly restricted the defendant's cross-examination and evidence on damages to such an extent that it constituted reversible error. Since the general verdict for both claims makes it impossible to segregate the damages, I therefore concur in the reversal of the judgment of the court below and the award of a new trial on the second claim. For myself, I would award a new trial on both claims.

C. Order Denying Petition for Rehearing.

Present: STALEY, *Chief Judge*, and MCLAUGHLIN, KALODNER, HASTIE, SMITH, FREEDMAN and SEITZ, *Circuit Judges*.

The petition for rehearing filed by EMILIO ALBERGO, Appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

WILLIAM F. SMITH,
Judge.

Dated: October 13, 1966

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IN THE

Supreme Court of the United States

No. 959 OCTOBER TERM, 1966

EMILIO ALBERGO, Petitioner,

v.

READING COMPANY, Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 959

Emilio Albergo, Petitioner,

v.

Reading Company, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals for the Third Circuit, and the dissenting opinion (App. B of Petition) are unreported.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Was not the Court of Appeals correct in entering judgment notwithstanding the verdict when the evidence was plainly insufficient to support, with reason, either the conclusion that the respondent was negligent or the conclusion that such negligence played some part in petitioner's injury?

2. Is not the doctrine of *res ipsa loquitur* inapplicable when there was no evidence that the injury was such as would not occur in the absence of negligence by respondent; there was no evidence that the possible causes of the injury were under respondent's exclusive control; and petitioner failed to raise this question either in the district court or in the court of appeals?

STATEMENT

This brief relates to an action under the Federal Employers' Liability Act which involves two independent causes of action. The first is based upon an accident which occurred on July 16, 1958 (R.4-6); the second upon an accident which occurred on November 17, 1961 (R.7-8). We are concerned here with the first claim only.

On July 16, 1958, petitioner, an employee of respondent railroad, was injured while standing next to a gondola car, when a metal band used to secure cargo on the car snapped and struck him. The jury returned a verdict for petitioner and judgment was entered thereon. Respondent moved for a new trial on the grounds that the trial court had unduly restricted its cross-examination and evidence on damages, and also moved for judgment notwithstanding the verdict on the grounds that the evidence was insufficient to support, with reason, the conclusion that any negligence of respondent played any part in petitioner's injury. Both motions were denied.

Petitioner's theory of respondent's negligence urged at the trial was predicated upon the existence of notice on the part of respondent of an unsafe condition caused by the snapping of the metal bands (R. 8, 10, 11, 49). However, the testimony of petitioner's witnesses at the trial, with one exception, indicated only that they had seen broken straps hanging from the sides of cars (R. 13, 30-37), not that they had seen the straps snap. The only testimony of

straps actually snapping was devoid of any description of the surrounding circumstances and was completely lacking in probative value (R. 35).

The Court of Appeals, viewing the evidence in the light most favorable to the petitioner, found that the evidence was not sufficient to warrant submission of the question to the jury, since petitioner's proofs established nothing more than that he was injured as a result of an accident (Pet. App. 4a). The question of whether the trial court erred in refusing respondent's motion for a new trial on petitioner's first claim was discussed by only one judge of the appellate court, who, in an opinion which concurred in part and dissented in part, found that the trial judge had unduly restricted respondent's cross-examination and evidence on damages to such an extent that it constituted reversible error requiring a new trial (Pet. App. 6a). The majority did not consider the question of a new trial on the first claim, having reached the conclusion that respondent was entitled to judgment notwithstanding the verdict. (Pet. App. 2a-5a)

ARGUMENT

The Court of Appeals for the Third Circuit, after hearing argument and a careful review of this record, viewing the evidence in the light most favorable to the petitioner, found that petitioner had failed to present evidence upon which the jury could, with reason, find that any negligence on the part of respondent played any part in petitioner's injury. This decision is clearly justified on the record and is consistent with the decisions of this Court, meticulously cited as authority by the Court of Appeals, defining the function of an appellate court in Federal Employers' Liability Act cases.

Petitioner's reliance on the doctrine of *res ipsa loquitur* cannot serve to correct the absence of proof in this record since petitioner failed to urge this theory in the lower

courts. Nor does the doctrine apply to the facts in this case, since there was no evidence that the accident was one which would not occur in the absence of respondent's negligence.

The instant case is not one which meets the criteria that define those "special and important reasons" necessitating the granting of a writ of certiorari. The question here presented merely involves the fair assessment of the record by the Court of Appeals on the issue of unsubstantiality of the evidence, and is not of general importance since the decision below turns on the peculiar facts of this case and the barrenness of the record presented.

I. No Absolute Right to a Jury Determination Exists in Federal Employers' Liability Act Cases.

A case based on the Federal Employers' Liability Act can not be submitted to a jury unless plaintiff has met his burden of producing probative facts from which the jury could with reason infer both negligence and that such negligence played some part in his injury. *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500. In *Rogers*, this Court reversed the decision of a state court and held that the evidence was sufficient to support a jury finding in plaintiff's favor. However, in describing the test for submission of a Federal Employers' Liability Act case to a jury, this Court used the following words (pp. 506-07):

> "Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death."

This quotation indicates that where there is evidence from which a jury could *with reason* conclude that the

negligence of the defendant contributed in whole or in part to the plaintiff's injury, the issue is for the jury to determine; the case does not, however, hold that every case must be submitted to the jury, even in the absence of evidence of negligence from which a jury could reach such a conclusion with reason.

At the same time, in *Herdman* v. *Pennsylvania R. Co.*, 352 U.S. 518, this Court held that no jury question of negligence was presented by the proofs, and the decision of the Court of Appeals, which had affirmed a judgment on a directed verdict in favor of the defendants, was affirmed. In that case, petitioner, a conductor in charge of a train, brought an action for injuries allegedly suffered from a fall occurring when the train suddenly stopped. Plaintiff presented evidence which indicated that the train had been stopped by the engineman in an emergency to prevent striking an automobile. There was no evidence that the stop was made with any unusual or special severity and no evidence to prove that unscheduled or sudden stops of trains are unusual or extraordinary occurrences. The Court held that the evidence did not warrant the inference that the defendant was negligent.

Likewise, the Court in the *Rogers* case referred to a number of earlier cases in which this Court had found that no question for the jury was presented: *Moore* v. *Chesapeake & O. R. Co.*, 340 U.S. 573; *Eckenrode* v. *Pennsylvania R. Co.*, 335 U.S. 329; *Brady* v. *Southern R. Co.*, 320 U.S. 476. Since *Rogers*, this Court has continued to require that the evidence be sufficient to present a jury question, *New York, New Haven & Hartford Railroad Co.* v. *Henagan*, 364 U.S. 441.

It is clear, therefore, that the evidence must be sufficient to support, with reason, the conclusion that the employer was negligent and that such negligence played some part in the injury. In the absence of such evidence, no question is presented for determination by the jury.

II. Petitioner Failed to Produce Any Evidence of Negligence on the Part of Respondent in Connection with His 1958 Accident and the Evidence Established Only That the Band Snapped and Struck Him.

(1) The fact of an injury alone does not constitute evidence of negligence;

(2) There was no evidence as to what caused the band to snap;

(3) There was no evidence that any conduct on the part of respondent caused the band to snap;

(4) There was no evidence that the band was in any way defective;

(5) There was no evidence that respondent knew or had reason to know that the band would snap and create an unsafe place to work.

Petitioner contended at the trial and before the Court of Appeals that he was entitled to recover under the Federal Employers' Liability Act with respect to his 1958 accident because respondent was on notice prior to the accident that these bands were likely to break (R. 8, 10, 11, 49).

This contention finds no support in the record. On the contrary, petitioner testified merely that as he was standing near the subject car the bands broke loose and struck him (R. 8, 9, 10). With respect to petitioner's contention that respondent was on notice that the bands had snapped under similar circumstances before, petitioner's testimony only establishes that he had seen gondola cars with straps hanging down quite often prior to July of 1958. In no way does the testimony relate them to a band suddenly breaking and swinging over the side (R. 13, 14).

The testimony elicited from petitioner's witnesses concerning the 1958 accident is to exactly the same effect and

was no more probative concerning the manner or cause of the subject accident than the testimony offered by petitioner himself. There is no evidence to support petitioner's argument that the bands they had seen before were hanging because they had snapped or broken while applied to loaded cars, such as occurred at the time of petitioner's injury. Neither petitioner nor any of his witnesses testified that they had ever seen a band break before on a loaded car. Rather, the testimony clearly demonstrates that they had only seen bands hanging from cars but they were unable to say whether the bands had broken or had been cut by the consignee and left extending from the car (R. 30-37). Mr. McGinley was the only witness who said that he had ever seen bands break before but his testimony is barren of any evidence concerning under what circumstances such breaking might have occurred, not even whether the bands he saw break were on loaded or unloaded cars. He specifically stated that his only personal experience involved a band which had been cut and was sticking out from an empty car as it went by him (R. 35-36).

Closely analogous to the instant case on the question of notice is the case of *Inman* v. *Baltimore and Ohio R. Co.*, 361 U.S. 138. In that case petitioner was injured by a drunken driver at a crossing where he was flagging traffic for a passing train. The petitioner contended that the railroad was negligent because it failed to afford enough protection. The judgment for petitioner was reversed by the state appellate court and this Court affirmed. After noting that there was no evidence of similar accidents at the crossing, this Court said (pp. 140-41):

> "The contention of petitioner is that the witness' remark, 'like a lot of them I seen there, jumping the gun,' was testimony of other occurrences at the crossing similar to the one here involved. The burden of proving that the crossing was an unsafe place to work was on petitioner. It depended on some type of testimony

showing the hazards at the crossing. There is no evidence of complaint to the railroad, nor is there other testimony of similar occurrences in the record. In making the judicial appraisal of this tenuous proof, Ohio's Court of Appeals held it not sufficient. It found that there was 'no evidence of prior occurrences of the kind here under consideration' in the record. Indeed, unless these 11 words of the witness can be said with reason to be sufficient, there is none. Under such circumstances, they are too slender a reed for us to say that the decision of Ohio's court is erroneous."

Similarly in the instant case the United States Court of Appeals for the Third Circuit found that evidence of similar occurrences in the past was lacking. The testimony of the one witness referred to above that in his eighteen years of experience with the railroad he had seen bands break at least twice, with no evidence of the surrounding circumstances, is completely lacking in probative value. Such testimony does not even constitute a slender reed; it has no weight at all.

Lacking any evidence of similar occurrences in the past upon which notice to respondent might be predicated, petitioner contends that the United States Court of Appeals for the Third Circuit ignored respondent's duty to inspect the gondola car in question. The record, however, is devoid of any evidence that respondent failed to inspect the car in question. Petitioner further contends that respondent's duty to inspect implies constructive notice of any unsafe conditions. But such constructive notice arises only if the defect is discoverable upon reasonable inspection. *Baltimore and Potomac R. Co.* v. *Mackey,* 157 U.S. 72. Petitioner in the instant case presented no evidence that the metal band was defective. Nor, even assuming the band was defective, was there any evidence that the defect was discoverable upon reasonable inspection.

Petitioner's reliance on the case of *Shenker* v. *Baltimore and Ohio R. Co.*, 374 U.S. 1, and cases of similar import is misplaced. In *Shenker*, the defect—a sliding door which would only open partially—was discoverable upon even a cursory inspection. So also, in *Dudley* v. *Scandrett*, 115 F. 2d 728 (9th Cir. 1940), the injury was caused by a sharp edge on a smokejack being shipped as cargo, a readily discoverable condition.

Nor was there any evidence that any conduct on the part of respondent caused the subject band to snap. On the contrary, the only evidence on that point came from petitioner's witness Horan who testified that "the coupling was made easy—it wasn't made hard, it wasn't what you would call a hard coupling" (R. 31).

Petitioner in this case presented evidence only of the fact that a two-inch metal band broke and that this accident resulted in an injury. Petitioner's contention that such evidence presents a factual issue for the jury presupposes that the Federal Employers' Liability Act makes respondent an insurer of its employees' safety. This court has clearly held that the Act has no such effect. *Inman* v. *Baltimore and Ohio R. Co.*, 361 U.S. 138.

III. The Doctrine of Res Ipsa Loquitur Is Not Applicable in this Case.

Petitioner seeks to correct the evidentiary defects in this record by a belated reliance on the doctrine of *res ipsa loquitur*. Petitioner contends that the Court of Appeals for the Third Circuit *denied* him the application of the doctrine. How could petitioner have been denied that for which he never asked? At no time prior to his petition for a writ of certiorari, in the pleadings, during the pretrial, trial, and post trial proceedings, or on appeal has petitioner relied on the doctrine. The record is clear that petitioner sought to show actual or constructive notice of some defect in the metal band which snapped and, as the

Court of Appeals for the Third Circuit found, he failed to prove the existence of either a defect or notice. If there had ever been an inkling that *res ipsa loquitur* would be urged, the respondent would have been entitled to offer evidence to prove that the operative facts which give rise to the inference were absent in this case. The injustice of allowing petitioner to rely on the doctrine at this late date, since it deprives respondent of his right to offer rebuttal evidence, is manifest.

The general rule that an appellate court will not consider questions not raised and passed upon in the lower court is founded on considerations of practical necessity, elementary fairness, and the orderly administration of the law. Petitioner would have this Court reverse the considered decision of the Court of Appeals for the Third Circuit on grounds which petitioner did not urge before that court. As this Court noted in *Robinson & Co.* v. *Belt*, 187 U.S. 41, 50:

> "While it is the duty of this court to review the action of subordinate courts, justice to these courts requires that their alleged errors should be called directly to their attention, and that their actions should not be reversed upon questions which the astuteness of counsel in this court has evolved from the record. It is not the province of this court to retry these cases *de novo*."

Furthermore, the reasons which militate against allowing a litigant to switch his theory on appeal become more compelling as the litigation proceeds to advanced stages. In re *Linda Coal and Supply Company*, 255 F. 2d 653 (3rd Cir. 1958).

Numerous appellate courts which have considered the question of whether the doctrine of *res ipsa loquitur* can be relied upon on appeal when not urged in the lower court have decided it cannot. *Broderick* v. *City of Waterbury*, 130

Conn. 601, 36 A. 2d 585 (1944); *Atlantic Coast Line Railroad Co.* v. *Columbia Salvage Corp.*, 138 S.C. 113, 135 S.E. 877 (1926); *Flader* v. *Simonsen*, 148 Colo. 480, 366 P.2d 678 (1961); *Kerby* v. *Chicago Motor Coach Co.*, 28 Ill. App. 2d 259, 171 N.E. 2d 412 (1960). In *Fassbinder* v. *Pennsylvania Railroad Company*, 322 F.2d 859 (3rd Cir. 1963), the plaintiff's failure to assert in terms his reliance on the doctrine was held of no consequence. However, in that case the court relied upon the fact that it was undisputed that the injury was caused by defective equipment of the railroad and the defendant therefore had clear notice that it was faced with a *res ipsa loquitur* situation. Not only was there no undisputed defect in the instant case, but petitioner also presented no evidence whatsoever that the metal band was defective, and respondent therefore had no notice that the applicability of the doctrine might be an issue.

Even assuming that petitioner's failure in this regard is not fatal, his reliance on the doctrine is entirely misplaced. In *San Juan Light & Transit Co.* v. *Requena*, 224 U.S. 89, this Court defined the operative conditions necessary for the application of the doctrine (pp. 98-99):

> "[W]hen a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence in the absence of an explanation, that the injury arose from defendant's want of care."

There was no evidence in the instant case that this injury was one which ordinarily would not occur if respondent used proper care. Nor can this conclusion be based on the nature of the accident alone. Such a conclusion might flow naturally from a derailment, *Jesionow-*

ski v. *Boston & Maine R. Co.*, 329 U.S. 452, or from the falling of a block being held by a co-worker, *Johnson* v. *United States*, 333 U.S. 46, because experience indicates that the operations involved in these cases are ordinarily safe if the one performing the operation exercises due care.

Nor was there evidence that respondent had exclusive control of the operative factors which might have had a casual connection with the accident. There was no evidence that respondent selected, purchased or stocked the bands, as in *O'Neill* v. *Baltimore and Ohio R. Co.*, 348 U.S. 956, or that respondent loaded the gondola car, or that respondent attached the bands to the car, or even that the respondent had title to the car or its cargo. The evidence showed only that respondent had possession of the car itself at the instant of the injury. Without evidence that respondent had exclusive control of the operative factors that might have caused the band to snap, no inference of negligence arises. *Jesionowski* v. *Boston & Maine R. Co.*, 329 U.S. 452.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN R. MCCONNELL
WILLIAM J. TAYLOR
Counsel for Respondent.